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No. 94-951

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

Estate of SHELTON A. McHENRY,
Deceased.

EDWARD S. HALL, et al.,

Petitioners

vs.

THOMAS E. O'SULLIVAN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CALIFORNIA JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

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Petition for Writ of Certiorari
To the California Court of Appeal

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF CALIFORNIA JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of this Court, the California Justice Foundation (CJF) respectfully requests leave to file a

brief amicus curiae in support of petitioners.

Counsel for petitioners has consented to the filing of this brief and counsel for respondents have declined consent. The letters from said counsel will be filed with the Supreme Court clerk.

INTEREST OF THE AMICUS CURIAE

The CJF is a non profit membership corporation formed to improve the performance of the legal profession and to improve the administration of justice and the public's confidence in the justice system.

In addition its purpose is to submit briefs as amicus curiae in appellate cases involving signficant issues affecting attorneys' participation in the legal process.

The CJF has participated in numerous cases in the Courts. The CJF conducts seminars and programs to improve the justice system and the administration of justice, as well as the performance of attorneys.

CJF and its members have a strong interest in the development of sound legal principles governing procedural and substantive issues arising from attorneys' participation in the legal system. In particular, CJF is vitally concerned about the questions presented by petitioners regarding the trial court and appellate standards applicable to the situation where an attorney drafted a will making himself a prime beneficiary of a $7 million plus estate of a legally blind and infirm client, under extremely suspicious circumstances, and the standards of the appellate review

of the trial court's decision. Proper review by the appellate courts, under proper criteria, provide critical safeguards in the legal system for the correction of erroneous and unjustified decisions.

Because of the CJF's interest in the outcome of this case, as well as its extensive experience in the proper standards of an attorney's conduct, CJF is able to provide an additional broader perspective on the important issues raised by petitioners.

A broader perspective is particularly important because of the public's low esteem of the legal profession and the need for the public to know that the courts are trying to correct attorneys' overreaching and personal enrichment at the expense of their clients and their estates.

CJF believes that an amicus curiae brief will be of assistance to the Court in considering the petition for a writ of certiorari.

One of the purposes of a brief by CJF is to call to the Court's attention an important issue of denial of due process in the within case by the state court allowing such a matter to be treated so lightly and to treat the case as a short cause matter giving the parties only a few hours for trial; by the court itself not being interested in the complete conduct of the attorney where the petitioners wanted to show evidence of forgery by the attorney; by his not inventorying all of the assets in the estate; by using his position of trust for personal benefit; and the attorney's complete disregard for the honor of the legal profession and its integrity.

For the foregoing reasons, the Motion of the CJF for leave to file a brief amicus curiae in support of petitioners should be granted.

Dated: December 27, 1994.

Respectfully submitted,

John Rakus, Counsel
for California Justice
Foundation

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INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

This case involves a will contest wherein an attorney for a legally blind, infirm client, had the client sign a will soon after the client returned home from the hospital after a lengthy stay, leaving the attorney one-half of the $7 million residue of the estate. The will was not witnessed by disinterested parties, but rather by the law clerk and secretary of the attorney who were directed by the attorney, not by the client.

PROCEEDINGS IN TRIAL COURT

The complete chronology of facts involving the development of the case, is well provded in the petition for writ of certiorari and need not be repeated here. See Petition at page 3 et seq... Amicus will limit its re-counting to the essential facts related

to the arguments presented by amicus.

ARGUMENT I

DUE PROCESS REQUIRES ADEQUATE TIME AND CLOSEST SCRUTINY

Due process requires that there be given adequate time to try a case. The lower court only allowed a few hours for the complete trial, and excluded important evidence which was a denial of due process.

In the first appeal from the granting of a Motion for Summary Judgment, the California Appellate Court sent the case back to the trial court to engage in the "closest scrutiny". In any interpretation of "closest scrutiny" the lower court should have allowed any evidence to show the conduct of the attorney who drafted the will. When the conduct of an attorney is so egregious the court should look into the matter "sua sponte".

The court was not concerned that the attorney had forged the client's initials on the will. The court was not concerned nor would it allow testimony that the attorney and Mr. Lynch went into decedent's safe a few hours after his death, took out an envelope marked "will" and denied its existence.

The Court did not concern itself with the fact that O'Sullivan saved every scrap of note paper, copies of all wills, etc., of the decedent and his predeceased spouse, for years, but yet had nothing to substantiate the 1984 will. On pages 18 and 19 of the Petition, it states:

> "... O'Sullivan claimed he wrote these changes on the 1981 copy -- though, suspiciously, at this critical time O'Sullivan could not locate the copy or any other notes indicating changes."

The court allowed the attorney to testify on his own behalf and gave a lot of credence to his self-serving testimony which should not have been allowed. Estate of Teed (1952) 112 Cal. App. 2d 638, 644. 247 P. 2d 54.

The Court did not discount the fact that the attorney did not inform his client sufficiently about the preparation of the will. In the Will of Tank (1986) 132 Misc. 2d 146, 503 N.Y.S. 2d 495, 496 (commenting on the American Bar Asso ciation's model rule of conduct), the New York court, even though it accepted as true the lawyer's account that it was the testator who made the suggestion, it still held:

> "The lawyer had an ethical duty to further discourage and refuse such a bequest-- particularly when not founded upon any friendship, relationship, or other affection. The very purpose of the .. [sua sponte duty of the court to

> inquire into such wills ("Putnam doctrine" in New York State) is to prevent the inherent wrong of an elderly decedent unduly or inexplicably rewarding those upon whom...[the decedent] becomes dependent, such as doctors, nurses, clergymen, lawyers, etc., ...Id., at 498."

Holding the lawyer's acceptance of the gift improper, the Tank court stated that only the court's firmness in rectifying the situation can maintain the public confidence in lawyers and other professions. Ibid.

See also the Matter of Delovey (1988) 141 A.D. 2d 540, 529 N.Y.S. 2d 153.

PROTECTING THE PUBLIC

Executors and beneficiaries were failing to pay creditors and hiding behind the short claims statues which shortened the statute of limitations on

filing claims against estates until this court acted in the case of Tulsa et al., v. Pope. 485 U. S. 478, 491, and ruled that notice must be given to all reasonably ascertainable creditors and they must have a reasonable time to file their claims. This court cleared up conflicting rules throughout the United States and protected the creditors. It is a landmark case and followed by all of the probate courts throughout the United States.

By hearing the Petition for Certiorari presented by petitioners, it is asking nothing more than protection for the public against such conduct of attorneys who have a chance to line their pockets by taking advantage of their clients when drafting wills or living

trusts. When we are talking about millions as opposed to a token amount it becomes extremely serious and this court should take an active part in getting rid of this abuse and protect the public. There must be a uniformity of treatment in following the rules of "due process."

In California, and in one particular matter involving an attorney in Orange County by the name of Attorney Gunderson, it was the news media that exposed the conduct of this attorney, and only after this did the courts and the Bar Court become involved.

Exposure of the conduct of the attorney in the case here, should have been allowed by the lower court through documentary and oral testimony, but it would not do so. The

only means by which the public can then be protected is through this Court.

ARGUMENT II

DUE PROCESS SHOULD REQUIRE THE APPELLATE COURT TO USE THE STANDARD OF CLEAR AND CONVINCING EVIDENCE EXCLUDING TESTIMONY OF ATTORNEY

The California Appellate Court set forth the standard of review as follows:

> "The standard of review on appeal is well settled. ' "The question whether the evidence adduced by a party who has the burden of proof carries the required weight is for the trier of fact and the court of review."' (Estate of Gelonese (1974) 36 Cal. App. 3d 854, 863.) This means that the trial court's finding that the presumption of undue influence was rebutted may not be disturbed on appeal if there is substantial evidence to support it. (ID. at pp. 966-967; Estate of Clegg (1978) 87 Cal. App. 3d 594, 600.) All conflicts in evidence must be resolved in favor of the respondents, and all legitimate and reasonable

> inferences must be indulged to uphold the judgment if possible. Ibid.)

Due process requires there be a higher standard of review. It should be clear and convincing evidence and exclude the testimony of the attorney who drafted the will and inheriting millions.

Due process should require that the bequest to the attorney be void on its face unless the will was drafted by an independent attorney.

There are no longer jury trials for will contests in California, so the case hinges on the trial courts' interpretation so there is no effective review. The case of Honda v. Oberg, 114 S. Ct. 2331 (1994) is a recent development in the law to provide the appellate court with authority and guidelines for following "due process", as required by the 14th amendment.

There should not be one rule in New York and one rule in California. There must be a uniform rule applied to attorneys drafting wills.

CONCLUSION

For the foregoing reasons, amicus respectfully urges this Court to grant the petition for writ of certiorari.

DATED: December 27, 1994

Respectfully submitted,

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